

SENATE JUDICIARY COMMITTEE
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SB 347

Senate Bill 347
February 18, 2011
Presented by Bob Lane
Senate Judiciary Committee

Mr. Chairman and committee members, I am Bob Lane, Chief Legal Counsel of Montana Department of Fish, Wildlife & Parks (FWP). FWP opposes, Senate Bill 347.

It is difficult to understand the purpose and even more difficult, to understand any benefit from SB347.

There are benefits from the present law requiring agencies to perform an analysis of the potential for an unconstitutional taking of private property by an agency action. It requires an agency to think about the consequences of a new rule, or similar agency action, on private property before the agency adopts the rule or takes the action. When an agency realizes there may be an unconstitutional taking, the agency may then avoid a taking by either not cancelling the proposed action or modifying its rule or action to avoid the taking.

This bill adopts an expansive new definition of taking or damaging such that any agency action is potentially a regulatory taking as defined by the bill. This new definition is radically different from the actual, present law defining when a constitutional taking occurs that requires just compensation to a property owner and could cripple with needless bureaucratic red tape an agency's ability to do the job it is mandated by other laws to do.

There is, however, no requirement that money be paid to a property owner for a limit or restriction on a person's use of their property, including a business conducted on the property. The penalty is that a court will be required to invalidate an agency action that does not comply with the new procedural requirements.

There are at least three major problems created by SB347.

An agency must invest considerable resources in evaluating anything it plans to do based on a fictional and extremely broad and one-sided "takings" analysis.

Next, the taking analysis may only consider negative impacts on private property and businesses. The positive benefits that government regulations achieve, such as protecting property values and protecting businesses from unfair compensation, cannot be part of the assessment. This means the assessment is practically worthless in informing the public even though the bill requires extensive public notice.

Further, it will encourage property owners and business owners to believe that as a result of an agency action they are harmed and should be compensated. This is extremely unfair to private property owners, because they will see only the negative consequences of an agency action without the balance of the positive benefits.

For no good reason, SB347 will unfairly promote a mistrust of government that is undeserved. This helps no one.